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in the

Supreme Court

of the

United States

OCTOBER TERM, 1980

MANUEL JUAN ALVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the petitioner's rights to due process of law and confrontation of witnesses were violated where his conspiracy conviction was not supported by proof of guilt beyond a reasonable doubt and where the lower court relied upon inadmissible statements of coconspirators to affirm the conviction?

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DECISIONS BELOW

The petitioner seeks review of the en banc decision reported below as United States v. Alvarez, 625 F.2d 1196 (5th Cir. 1980)(en banc). The panel decision is reported as United States v. Alvarez, 610 F.2d 1250 (5th Cir. 1980).

JURISDICTION

The decision sought to be reviewed was decided on September 17, 1980. United States v. Alvarez, 625 F.2d 1196 (5th Cir. 1980)(en banc). Rehearing was denied on October 23, 1980. An application for extension of time to file a petition for writ of certiorari was presented to Justice Powell on December 1, 1980. An order extending the time for the filing of this petition for a writ of certiorari to and including January 21, 1981, was entered by Justice Powell on December 1, 1980.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States which provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the Constitution of the United States which provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.

STATEMENT OF THE CASE

Nature of the Case and its Disposition

Following a jury trial, the petitioner, Manuel Juan Alvarez, was convicted of conspiracy to import marijuana in violation of 21 U.S.C. Section 963 (1976). Alvarez was sentenced to imprisonment for four years to be followed by a two-year special parole term. On appeal, a panel of the Fifth Circuit Court of Appeals unanimously reversed the conviction holding that the government had failed to prove beyond a reasonable doubt that Alvarez had joined in an agreement to engage in illegal activity. United States v. Alvarez, 610 F.2d 1250 (5th Cir. 1980).

Sua sponte, the Fifth Circuit ordered that the appeal be reheard en banc. On hearing en banc, the court divided fifteen to nine, the majority concluding that the government had proved its case. United States v. Alvarez, 625 F.2d 1196 (5th Cir. 1980)(en banc).

Statement of the Facts

.The majority opinion below characterized the facts, viewed in the light most favorable to the government, as follows:

During April and May of 1978, John Cifarelli and Edward Peterson discussed with undercover DEA agents Martinez and Caton their scheme for importation of marijuana from a farm in Colombia to the Miami area. The transportation was to be by aircraft to be loaded at a farm in Colombia owned by a coconspirator, refueled at a small island in the Caribbean and off-loaded at a rural site west of Miami. The undercover agents were to supply the aircraft for an agreed price.

The owner of the Colombian farm, Genaro Cruz, arrived in Miami from Colombia on May 16. He spent the night with the petitioner, Alvarez, his friend. On May 17, Alvarez drove a pickup truck to a local Miami airport. Cruz rode in the truck which was loaded with household appliances. At the airport they met Cifarelli, who directed them to the plane which had been supplied by the undercover agents.

The agents had not previously met or heard of Alvarez or Cruz. Hearsay was adduced (over objection) that Cifarelli told Agent Martinez that the two men in the pickup truck were the Colombian farmer and the one who would be at the off-loading site on return. Additional hearsay established that the agents had been told that the owner of the Colombian farm would handle things on that end and that arrangements would be made for unloading the plane when it returned.

Agent Martinez discussed the plan with Cruz who confirmed that he owned the farm. Martinez then asked Alvarez if he was going to be there at the unloading site.

Alvarez smiled and nodded affirmatively. After Alvarez had loaded appliances on the plane and was about to leave in the truck, the identity of the agents was revealed and the arrests were made.

The majority characterized two additional aspects as having "probative effect." On May 10, the agents were to be shown the field. Nick, an associate of Cifarelli, was to speak with the person who "had the field" and get the key to the gate. Nick failed to return when expected. The agents and Cifarelli found Nick at an apartment house. Nick explained that he had encountered a problem at the apartment house and that the landing field they were to be shown was unacceptable. It later was learned that Alvarez lived at the apartment house.

The second aspect concerned May 15, when the agents went to see the off-loading site. The group agreed that two trees would have to be removed prior to the landing.

Based upon these facts, the majority held that a jury could infer that Alvarez was a guilty coconspirator.

ARGUMENT

This Court has stated that the guarantee of due process "prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 309 (1979). The majority en banc decision below has impermissibly compromised that due process standard. The majority has also sanctioned the "bootstrapping" of conspiracy convictions with hearsay statements universally held inadmissible absent proof that the accused was a conspirator.

In Jackson v. Virginia, supra, it was said that the facts rendered it impossible "to determine that there is an appreciable risk that a factfinding made by a jury beyond a reasonable doubt, and twice reviewed by a trial judge on directed verdict and post-trial acquittal motions and by one or more levels of appellate courts . . . is likely to be erroneous." Id. at 333 (Stevens, J., concurring).

But in the case of Alvarez, such an "appreciable risk" is demonstrated by the judgments of the nine judges of the

Fifth Circuit who opined that the verdict is erroneous. This is not to say that certiorari review by this Court is appropriate here merely because of a split of opinion below. The majority opinion carries ramifications sufficiently significant to set it apart from a case solely involving a difference of opinion regarding the guilt of an accused. The opinion is one in a continuing series of broad interpretations of conspiracy law apparently not cast upon any other branch of criminal law.

The singling out of conspiracy for the sanctioning of lax constitutional standards has dramatically enhanced the arsenal of the prosecution. "By eliminating the distinction between perpetrators and accessories, criminalization of conspiracy eradicates common-law and theoretical methods of distinguishing the degree of liability of various participants in criminal enterprises. [Citation omitted]. Those who supply the means of committing an offense -although those means may be available elsewhere - become as liable for the offense as those who actually commit it if they are viewed as participants in the conspiracy. Thus, conspiracy can be a powerful weapon for prosecuting accessories to crime." United States v. Alvarez, 610 F.2d at 1253-4 (panel decision).

Other advantages unique to conspiracy charges which place heavy burdens upon the defendant have caused the offense to be dubbed the "prosecutor's darling." "Conspiracy - The Prosecutor's Darling" by Solomon A. Klein, 24 Brooklyn L. Rev. 1 (Dec. 1957). Those advantages include the inherent vagueness of the crime itself, the likelihood of guilt by association, and the admissibility of otherwise inadmissible hearsay on the basis of the coconspirator exception.

The Alvarez opinion enhances those advantages beyond the degree of constitutional permissibility by effecting a relaxation of the due process requirement of proof beyond a reasonable doubt in at least two significant ways.

First, the majority compromises the reasonable doubt standard by "inferring" guilt from facts plainly consistent with innocence. Those facts are summarized by the

dissenters as follows:

> This is not a case where an alleged conspirator was engaged in an illegal act or in the presence of a large quantity of contraband so that it reasonably may be inferred that he knew what was afoot. Neither is it a case where he was shown to have participated in or even been present during any conspiratorial conversation. Alvarez was engaged in a completely legal act. He was loading a washing machine onto an airplane. He was asked whether he was going to be there at the unloading site when the plane got back. It was in response to this innocuous inquiry that he smiled and nodded his head. This is all the admissible evidence to which we are cited to show that Alvarez knew of the unlawful conspiracy and agreed to join it.

625 F.2d at 1199. Such facts, as a matter of law, fail to establish proof of guilt beyond a reasonable doubt. See Holland v. United States, 348 U.S. 121, 140 (1954).

The affirmance of Alvarez' conviction conflicts with this Court's ruling in United States v. Falcone, 311 U.S. 205, 210 (1940):

> Those having no knowledge of the conspiracy are not conspirators . . .; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.

A conspiracy charge is not proven beyond a reasonable doubt where the government has failed to demonstrate an intent "to further, promote and cooperate in" the illegal activity. Direct Sales v. United States, 319 U.S. 703, 711 (1943). This Court's admonitions in Direct Sales and Falcone were not heeded in the Alvarez opinion.

Secondly, the majority impermissibly buttresses its conclusion that the government proved its case by relying upon the hearsay statements of coconspirator Cifarelli. "The conversations of participants in the conspiracy to which the majority alludes were not even admissible as to Alvarez unless it be shown that he too was a conspirator. United

States v. James, 590 F.2d 575, 581 (5th Cir.)(en banc), cert. denied, 442 U.S. 917 (1979)." 625 F.2d at 1199. Such a flagrant abuse of the coconspirator exception to the hearsay rule violates Alvarez' constitutional right to confrontation of witnesses as guaranteed by the Sixth Amendment to the Constitution of the United States. Also violated thereby is this Court's pronouncement that admissibility must depend upon independent evidence in order to prevent the statement from "lift[ing] itself by its own boot straps to the level of competent evidence." Glasser v. United States, 315 U.S. 60, 75 (11942). See also United States v. Nixon, 418 U.S. 683, 700-1 (1974).

In sum, this case affords this Court the opportunity to review and correct major erroneous assumptions regarding conspiracy law as well as the opportunity to undo a miscarriage of justice.

CONCLUSION

In the process of affirming the conviction of the petitioner, the Fifth Circuit has seriously compromised the due process standard of proof beyond a reasonable doubt and the Sixth Amendment guarantee of the right to confront witnesses. The nine dissenters below refused to relax these constitutional requirements even in the context of conspiracy law and characterized the majority's holding as follows:

> Alvarez nodded his head and smiled. For this he will go to the penitentiary. In another case a smile and the nod of the head may be sufficient to establish guilt. Here it clearly was not.

United States v. Alvarez, supra, 625 F.2d at 1199 (5th Cir. 1980)(en banc)(dissenting opinion).

The en banc decision below conflicts with this Court's holdings cited herein. These conflicts should be resolved in the petitioner's behalf.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Manuel Juan ALVAREZ,
Defendant-Appellant.

No. 78-5783.

United States Court of Appeals,
Fifth Circuit

Jan 30, 1980.

Defendant was convicted in the United States District Court for the Southern District of Florida, William O. Mehrtens, J., of conspiracy to import 110,000 pounds of marijuana from Colombia by Air. On appeal, the Court of appeals, Alvin B. Rubin, Circuit Judge, held that evidence that defendant planned to perform the act of unloading a plane subsequent to importation of marijuana, without more, was insufficient beyond reasonable doubt to prove that he had joined in conspiracy to import prohibited substance.

Reversed.

1. Criminal Law – 59(5)

Society is not protected against miscreants if only those guilty of major roles in crime are prosecuted.

2. Criminal Law – 59(5)

When an abettor is prosecuted, threshold question is whether he has so contributed to crime of another so as to be accountable as an abettor. 18 U.S. C.A. § 2.

3. Conspiracy – 40

If a conspiracy is charged, prosecution need not analyze whether a defendant conspirator's actions would ordinarily be sufficient to create liability as an abettor of an offense; all that is necessary is proof that defendant joined in an unlawful agreement. 18 U.S.C.A. §§ 2, 871.

4. Criminal Law – 59(5)

There can be no abettor without a completed crime. 18 U.S.C.A. § 2.

5. Criminal Law – 80

To prove guilt of an accessory, prosecution must prove that crime has been committed. 18 U.S.C.A. § 2.

6. Criminal Law – 44

Conduct that is substantial step toward commission of crime, usually commencement of crime by act directly dangerous to interest protected by law, is necessary to sustain conviction for attempt.

7. Conspiracy – 23

Criminalization of conspiracy punishes inchoate offense by prosecuting agreement itself, separating and stigmatizing jointly

planned criminal activity prior to its completion. 18 U.S.C.A. § 871.

8. Conspiracy – 23

A "criminal conspiracy" is an agreement to commit an offense against the United States. 18 U.S.C.A. § 871.

See publication Words and Phrases for other judicial constructions and definitions.

9. Conspiracy – 27

General federal criminal conspiracy act requires proof both of an agreement and overt act in furtherance of it; however, overt act need not be criminal in nature or create a danger to victim or society; it suffices if, however innocent, act furthers criminal venture. 18 U.S.C.A. § 371.

10. Conspiracy – 24

Essential prerequisite to existence of conspiracy is an agreement between two or more persons. 18 U.S.C.A. § 371.

11. Conspiracy – 40.1

A defendant does not join a conspiracy merely by participating in a substantive offense or by associating with persons who are members of a conspiracy; conspirator must knowingly agree to join others in concerted effort to bring about common end. 18 U.S.C.A. § 371.

12. Conspiracy – 23

Intent is an element of offense of conspiracy; each party must have intended to enter into agreement and schemers must have had common intent to commit an unlawful act. 18 U.S.C.A. § 371.

13. Conspiracy – 47(1)

For crime of conspiracy to be proved, there must be evidence sufficient to warrant belief beyond reasonable doubt that defendant intentionally entered into agreement to do illegal act with intention of consummating that act. 18 U.S.C.A. § 371.

14. Conspiracy – 23

To sustain conspiracy conviction, it is not enough that defendant may have wittingly aided a criminal act or that he may have intended to do so in the future; government must demonstrate that defendant agree with others that together they would accomplish the unlawful object of the conspiracy. 18 U.S.C.A. § 371.

15. Criminal Law – 552(1)

What people do is logical, albeit circumstantial, evidence of what lies in their minds.

16. Conspiracy – 44½

Agreement to join a criminal conspiracy may be inferred from performance of acts that further its purpose; however, such eviden-

tiary rule should not be permitted to obscure what it is admitted to prove, an agreement, for sans agreement there can be no conspiracy. 18 U.S.C.A. § 371.

17. Conspiracy – 40.1

Even if a conspiracy between two parties is established, not every act of a third person that assists in the accomplishment of objective of the conspiracy is sufficient basis to demonstrate his concurrence in that agreement. 18 U.S.C.A. § 371.

18. Conspiracy – 23

Partnership in profits of criminal venture is not essential to show conspiracy, but defendant must at least have demonstrated an intent to further promote and cooperate in illegal activity. 18 U.S.C.A. § 371.

19. Conspiracy – 40.1

A mere promise to do some act that might assist an embryonic conspiracy in achieving its yet unconsummated criminal end does not of itself demonstrate beyond reasonable doubt that promissor knows of conspiracy and has agreed to join in it. 18 U.S.C.A. § 371.

20. Conspiracy – 24

While conspiracy is seldom born of open covenants openly arrived at, there must be proof of common purpose and plan to prove that defendant has joined in conspiracy. 18 U.S.C.A. § 371.

21. Conspiracy – 40.1

To sustain conspiracy conviction, it is not necessary to prove that defendant knew either the entire scope or all details of scheme; it need be shown only that he knew its essential nature. 18 U.S.C.A. § 371.

22. Conspiracy – 47(1)

To sustain conspiracy conviction, it is essential that prosecution show beyond reasonable doubt that defendant had deliberate, knowing, specific intent to join conspiracy; such must be shown by substantial evidence, including evidence of some sort of agreement, an agreement understood by defendant, to which he was party and to which he meant to be a party. 18 U.S.C.A. § 371.

23. Conspiracy –47(12)

Evidence that defendant planned to perform act of unloading plane subsequent to importation of marijuana, without more, was insufficient beyond reasonable doubt to prove that he had joined in conspiracy to import prohibited substance. 18 U.S.C.A. § 406, 21 U.S.C.A. § 846.

Appeal from the United States District Court for the Southern

District of Florida.

Before FAY, RUBIN and HATCHETT, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Manuel Juan Alvarez was convicted of joining with three other persons in a conspiracy to import 110,000 pounds of marijuana from Colombia by air. The evidence against Alvarez, viewed in the light most favorable to the government, portrays him as an underling who loaded electrical appliances aboard a plane that was to fly from the United States to Colombia, and who had stated he would unload a cargo of marijuana upon its return. His attack on the sufficiency of the evidence to prove that a conspiracy existed or that he knowingly joined in it requires us to consider how much of the conspiratorial darkness must be illuminated to warrant a jury's determination that a specific defendant joined in a plot. We conclude that, while the evidence sufficed to show that Alvarez planned to assist others in one of the acts involved in consummating a criminal venture, it failed to show that he had joined in an agreement to violate the law, and we, therefore, reverse his conviction.

At the outset, we sum up the entirety of the evidence against Alvarez. The indictment named John Cifarelli, Genaro Mercia Cruz and Edward John Peterson as co-conspirators in a plan to import marijuana into the United States. Except for his joinder in the indictment, Alvarez is mentioned in only one other place in the indictment; it is charged as one of the overt acts that he together with Cifarelli and Cruz met two DEA agents at the Opa Locka, Florida, airport. The indictment against Peterson was dismissed, Cifarelli pleaded guilty and Cruz was found guilty when tried jointly with Alvarez. There was ample evidence of a conspiracy between Cruz and Cifarelli to import marijuana into the United States.

Pursuant to arrangements with an undercover DEA agent, Cifarelli came to meet the agent at the Opa Locka airport. Alvarez drove a pickup truck in which Cruz and Cifarelli were riding. The truck was loaded with some household appliances, including a washer and dryer; the DEA agent asked Cifarelli who Alvarez was and Cifarelli said Alvarez "would be at the off-loading side in the United States." The agent then spoke to Alvarez in Spanish and asked him if he planned to be at the unloading site. Alvarez nodded his head, signifying "yes," smiled, and asked the DEA agent, if he was going on the plane. The agent said he was. After the conversation, Alvarez

unloaded the household appliances from the truck. The agent then spoke with Cruz, and, after Cruz outlined his plans for arrival of the plane and its unloading in Colombia, all were arrested.

I.

[1] Society is not protected against miscreants if only those guilty of major roles in crime are prosecuted. Criminal ventures may be complex. The perpetrator of transgression may require help: before the crime to assist in planning it; during the course of his criminal activities to aid in executing it and in escaping from the scene; after the event is completed, to conceal him, or to assist him in avoiding detection or in concealing the loot or the evidence against him. Therefore, accessories to criminal acts were themselves considered criminals by the common law.

[2] Federal statutes continue at least part of this pattern. Thus federal law makes it criminal to aid and abet another in a crime[1] although there is no general federal statute against attempts, criminal solicitation or accessorial participation before the crime.[2] Criminal responsibility for abetting a crime requires that a defendant " 'associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek *by his action* to make it succeed.' L. Hand, J., in *United States v. Peoni*, 2 Cir., 100 F.2d 401, 402.-" *Nye & Nissen v. United States*, 1949, 336 U.S. 613, 619, 69 S.Ct. 766, 770, 93 L.Ed. 919, 925 (emphasis supplied); *United States v. Trevino*, 5 Cir. 1977, 556 F.2d 1265. When an abettor is prosecuted, the threshold question is: how much does someone have to contribute to the crime of another in order to be accountable as an abettor?[3]

1. 18 U.S.C. § 2 provides:
   § 2. Principals
   (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
   (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. *See* National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, §§ 1001 & 1003, comments at p. 62 & 64 (1970).

3. "In a typical case," as Professor Fletcher points out, "the defendant knows of an illegal activity by a group of persons and nonetheless provides a service with knowledge that his service will facilitate the illegal activity." G. Fletcher, supra, § 8.81, at 674. This mutation of accessorial responsibility into conspiratorial connivance does not result simply from confusion, prosecutorial or jurisprudential. It is easier to prove the charge of conspiracy than to establish guilt of the familiar accessorial crimes.

   To prove aiding and abetting may be difficult. There can be no abettor without a completed crime. *See Hendrix v. United*

[3] Federal prosecutions have often sidestepped the necessity of seeking the answer to this question by charging defendants involved in crime with a different criminal offense, joinder in a conspiracy. The prosecution need not even charge any completed offense because the crime of conspiracy condemns the agreement itself, treating all participants equally. Conspiracy also "collapses the distinction between accessories and perpetrators" through the doctrine of conspiratorial complicity, which punishes conspirators as principals in any substantive offense committed in furtherance of the conspiracy, whether or not they directly participated in that offense. *See* G. Fletcher, Rethinking Criminal Law, § 8.8.1, at 674 (1978). *See, e.g., Pinkerton v. United States*, 1946, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489. Thus, if a conspiracy is charged, the prosecution need not analyze whether a defendant conspirator's actions would ordinarily be sufficient to create liability as an abettor of an offense; all that is necessary is proof that the defendant joined in an unlawful agreement.

[4-8] By eliminating the distinction between perpetrators and accessories, criminalization of conspiracy eradicates common-law and theoretical methods of distinguishing the degree of liability of various participants in criminal enterprises. *See* G. Fletcher, *supra* at §§ 8.5-8.8. Those who supply the means of committing an offense – although those means may be available elsewhere – become as liable for the offense as those who actually commit it if they are viewed as participants in the conspiracy. Thus, conspiracy can be a powerful weapon for prosecuting accessories to crime.[3]

In the case before us the government has chosen the conspiracy indictment as the path to punishing Alvarez's planned complicity in an unconsummated criminal act. Under the facts shown, we decline to affirm that use of the federal proscription of conspiracy.

States, 5 Cir. 1964, 327 F.2d 971, 975; *United States v. Hyatt*, 2 Cir. 1977, 565 F.2d 229, 233. To prove the guilt of an accessory, the prosecution must prove that a crime has been committed. *Shuttlesworth v. Birmingham*, 1963, 373 U.S. 262, 83 S.Ct. 1130, 10 L.Ed.2d 335. When the justified intervention of law enforcement officers aborts the planned offense, there may be no way to prosecute anyone who proposed to join in committing it, mastermind or accessory, save by charging conspiracy.

Nor does the possibility of an attempt charge always provide a satisfactory alternate basis for prosecuting would-be accessories. Aside from the absence of a general federal statute against attempts, proof of an attempt, even in instances where statutory warrant exists, is difficult. It requires conduct that is a substantial step toward commission of a crime, usually the commencement of a

[9-11] The use of conspiracy as a device for prosecuting minor actors in criminal dramas is limited by the fact that conspiracy itself is not primarily a means of assessing the culpability of criminal accessories; it is a separate substantive offense.[4] Its prohibition is directed not at its unlawful object, but at the process of agreeing to pursue that object. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *Iannelli v. United States*, 1975, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616; *United States v. Conroy*, 5 Cir. 1979, 589 F.2d 1258, 1269, *cert. denied*, — U.S. —, 100 S.Ct. 60, 62 L.Ed.2d 40.[5] A defendant does not join a conspiracy merely by participating in a substantive offense, *see Pinkerton v. United States*, 1946, 328 U.S. 640, 643, 66 S.Ct. 1180, 1182, 90 L.Ed. 1489; *United States v. Carlton*, 5 Cir. 1973, 475 F.2d 104, 106, *cert. denied*, 414 U.S. 842, 94 S.Ct. 100, 38 L.Ed.2d 80, or by associating with persons who are members of a conspiracy. *Panci v. United States*, 5 Cir. 1958, 256 F.2d 308, 312. It is hornbook law that the criminalization of conspiracy does not proscribe purely a mental state; the agreement itself is the criminal act, an actor "in advancement of the intention which each of [the conspirators] has conceived in his mind." Lord Chelmford in Mualchy v. Regina, L.R. 3 Eng. & Ir. App. 306, 317 (1868) quoted in Harno, *Intent in Criminal Conspiracy*, 89 U.Pa. L.Rev. 6225, 630 (1941). The conspirator must knowingly agree to

crime by an act directly dangerous to interests protected by law. *See United States v. Oviedo*, 5 Cir. 1976, 525 F.2d 881; *United States v. Mandujano*, 5 Cir. 1974, 499 F.2d 370, *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812; *see also United States v. Jackson*, 2 Cir. 1977, 560 F.2d 112, *cert. denied* 434 U.S. 941, 98 S.Ct. 434, 54 L..Ed.2d 301.

Criminalization of conspiracy punishes the inchoate offense by prosecuting the agreement itself, separating and stigmatizing jointly planned criminal activity prior to its completion.

Moreover, there are practical reasons to charge a conspiracy even if a substantive crime has been committed. Indictment on both the planning and the con-

summation results in a multiplication of counts, and, as Professors LaFave and Scott sum it up, the conspiracy charge gives the prosecutor unique advantages and imposes a particularly heavy burden on the defendant. W. LaFave & A. Scott, Jr., Criminal Law § 61 (1972). These prosecution-tilted aspects of the charge include:

the inherent vagueness of the crime itself; *id.; see* Harno, *Intent in Criminal Conspiracy*, 89 U.Pa.L.Rev.624 (1941); *see also Krulewitch v. United States*, 1949, 336 U.S. 440, 445, 69 S.Ct. 716, 719, 93 L.Ed. 790, 795 (Jackson, J., concurring);

the ambit the conspiracy charge affords to introduce, on the basis of the co-conspirator exception, evidence that would otherwise be hearsay; Rule 801(d)(2)(E), Fed.R.Evid.;

the disposition of all courts our own included, to admit circumstantial evidence on somewhat relaxes standards of

bring about a common end. *United States v. Perez*, 5 Cir. 1973, 489 F.2d 51, 61, *cert. denied*, 1974, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664. These elements of the conspiratorial offense may of course be shown by circumstantial evidence.

[12, 13] In conspiracy, as in most criminal acts, intent is an element of the offense. Conspiracy is, however, more complex because it involves two elements of intent that shade into each other: each party must have intended to enter into the agreement and the schemers must have had a common intent to commit an unlawful act. *See* Harno, *supra*, 89 U.Pa.L.Rev. at 631. There often may be no practical purpose in distinguishing these two intentions, but, for the crime to be proved, there must be evidence sufficient to warrant belief beyond resonable doubt that the defendant intentionally entered into an agreement to do an illegal act with the intention of consummating that act. *United States v. Suarez*, 5 Cir. 1979, 608 F.2d 584.

[14] It is not enough that a defendant may have wittingly aided a criminal act or that he may have intended to do so in the future; to convict a defendant of

relevance on the rationale that the clandestine nature of the crime makes it unprovable in any other fashion; *see, e.g., Blumenthal v. United States*, 1947, 332 U.S. 539, 557, 68 S.Ct. 248, 256, 92 L.Ed. 154, 168; *United States v. Partin*, 5 Cir. 1977, 552 F.2d 621, 634, *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189; *United States v. Harrell*, 5 Cir. 1970, 436 F.2d 606, 612 & n. 7, *appeal after remand*, 458 F.2d 655, *cert. denied*, 1972, 409 U.S. 846, 93 S.Ct. 49, 34 L.Ed.2d 86; and

the utility of the additional count in possible plea bargaining, for, from the defense standpoint, it may be attractive to gain dismissal of substantive counts while pleading only to the conspiracy. On the other hand, the prosecution may willingly make such a plea bargain the knowledge that the court may impose a sentence as long as it would likely impose on the substantive count or counts. (18 U.S.C. § 371 permits a five year sentence and $10,000 fine.)

In attempting to understand conspiracy's use as a means of prosecuting accessories, we do not depreciate the seriousness of the offense itself. As defined in Federal law, a criminal conspiracy is an agreement to commit an offense against the United States. 18 U.S.C. § 371. It is established lore that combination to commit crimes is inherently more dangerous than the plan of one person alone. Concert of action makes criminal success more likely. Commitment to confederates may itself prevent a change of heart. *See United States v. Feola*, 1975, 420 U.S. 671, 693-94, 95 S.Ct. 1255, 1268, 43 L.Ed.2d 541. *See also* Comment, *The Role of Joint Endeavor in Establishing Conspiratorial Agreement*, 1979 Utah L.Rev. 133. Our recognition of the dangers to society inherent in group criminal schemes must not, however, obscure analysis of the crime.

4. Civil-law countries have not developed a comparably broad doctrine of conspiracy. "European criminal codes frequently make concerted action a basis for aggravating the penalties for completed substantive crimes, but when no substan-

conspiracy the government must demonstrate that the defendant agreed with others that together they would accomplish the unlawful object of the conspiracy. The indictment against Alvarez identifies the agreement as a plan to import marijuana. The intent to do an illegal act is embraced in the charge to violate the law *by importing marijuana*, but both the knowing agreement and the intent to import marijuana must be proved. We turn our attention first to the alleged agreement.

[15-17] What people do is logical, albeit, circumstantial, evidence of what lies in their mind. Extending this somewhat, courts have also considered that a person's acts might create an inference concerning what he has agreed to do. Therefore, whether or not an overt act is a component of the offense as defined by statute, an agreement to join a criminal conspiracy may be inferred from the perfomance of acts that further its purpose. This evidentiary rule should not be permitted to obscure what it is admitted to prove, an agreement, for sans agreement there can be no conspiracy. Note, *Developments in the Law – Criminal Conspiracy*, 72 Harv.L.Rev. 920, 933 (1959). Therefore, even if a conspiracy between two parties is established, not every act of a third person that assists in the accomplishment of the objective of the conspiracy is a sufficient basis to demonstrate his concurrence in that agreement.

In the leading case of *United States v. Falcone*, 2 Cir. 1940, 109

tive offense has been completed, only certain types of conspiracies are proscribed – notably those directed against the security of the state, those involving many participants organized for the purpose of committing numerous crimes and those contemplating particularly serious offenses." Comment, Developments in the Law – Criminal Conspiracy, 72 Harv.L.Rev. 920 (1959).

5. Some federal statutes condemn bare agreements to do unlawful acts as criminal, 21 U.S.C. § 846; but the general federal criminal conspiracy act requires proof both of an agreement and an overt act in furtherance of it. 18 U.S.C. § 371. The overt act need not, however, be criminal in nature or create any danger to the victim or society; it suffices if, however innocent, the act furthers the criminal venture. The essential prerequisite to the existence of a conspiracy is in any event an agreement between two or more persons. *Iannelli v. United States*, 1975, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616. *See* Comment, *The Role of Joint Endeavor in Establishing Conspiratorial Agreement*, 1979 Utah L..Rev. 133.

F.2d 579, *aff'd*, 1940, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128, the Second Circuit held that jobbers and distributors of sugar did not become members of a conspiracy to distill illegal spirits by knowingly selling sugar, yeast and cans that were used to make the alcohol. Before the Supreme Court, the government conceded that conviction of conspiracy could not rest "on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others. In such a case, as the Government concedes, the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly is not present here." 31 U.S. at 207, 61 S.Ct. at 205, 85 L.Ed. at 130. Instead the government contended that one who with knowledge of a conspiracy sells to a conspirator is himself guilty of the conspiracy. Finding that the evidence showed no more than knowledge of illicit use of the materials sold, the Supreme Court affirmed the Second Circuit's dismissal, saying "Those having no knowledge of the conspiracy are not conspirators . . .; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge." 311 U.S. at 210, 61 S.Ct. at 207, 85 L.Ed. at 132.

[18, 19] In the Court of Appeals opinion thus affirmed, Justice Learned Hand had, with characteristic style, placed a touchstone to mark the fundamental quality of the co-conspirator: "[H]e must in some sense promote their venture himself, make it his own, have a stake in its outcome." 109 F.2d at 581. Partnership in the profits of the criminal venture is not essential but the defendant must at least have demonstrated an intent "to further, promote and cooperate in" the illegal activity. *Direct Sales v. United States*, 1943, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269, 87 L.Ed. 1674. In *Direct Sales* the inference both of the agreement and the intent to join in it were found from the facts that a controlled substance

(not an article of free commerce) was being sold, high pressure sales methods were employed, the buyer's purchases were frequent, repeated and abnormal in size and the evidence showed systematic and prolonged cooperation with a physician to supply him with his stock in trade for illicit enterprise. This was sufficient to show that the seller had joined "both mind and hand" with the purchaser in a conspiracy. It also showed "stake in the venture" which was not an essential element of proof, but was not irrelevant. A mere promise, however, to do some act that might assist an embryonic conspiracy in achieving its yet unconsummated criminal end does not of itself demonstrate beyond reasonable doubt that the promisor knows of the conspiracy and has agreed to join in it.

[20, 21] While "a conspiracy is seldom born of 'open convenants openly arrived at,'" *Lacaze v. United States*, 5 Cir. 1968, 391 F.2d 516, 520, there must be proof of a "*common* purpose *and* plan," (emphasis supplied), to prove that a defendant has joined in a conspiracy. *United States v. James*, 5 Cir. 1976, 528 F.2d 999, 1010 – 11, *cert. denied sub nom.*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326. It is not necessary to prove that the defendant knew either the entire scope or all the details of the scheme; it need be shown only that he knew its essential nature. *Blumenthal v. United States*, 1947, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154; *United States v. Musgrave*, 5 Cir. 1973, 483 F.2d 327, *cert. denied*, 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315; *United States v. Quinn*, 2 Cir. 1971, 445 F.2d 940, *cert. denied*, 404 U.S. 850, 92 S.Ct. 87, 80 L.Ed.2d 90.

[22] It is essential, nontheless, that the prosecution show beyond reasonable doubt that the defendant had "the deliberate, knowing, specific intent to join the conspiracy." *United States v. Morado*, 5 Cir. 1972, 454 F..2d 167, 175, *cert. denied*, 406 U.S. 917, 92 S.Ct. 1767, 32 L.Ed.2d 116. This must be shown by substantial evidence. *United States v. Malatesta*, 5 Cir. 1979 (en banc), 590 F.2d 1379, *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777, including evidence of some sort of agreement; an agreement understood by the defendant, to which he was a party and to which he meant to be a party. *United States v. Suarez*, 5 Cir. 1979, 608 F.2d 584. Thus, as we have recently summed up, "[t]o convict, the government must prove that there was an agreement to accomplish an illegal act. It is not enough for it merely to establish a climate of activity that reeks of something foul." *United States v. Wieschenberg*, 5 Cir. 1979, 604 F.2d 326, 331-32.

[23] The evidence against Alvarez is insufficient to prove that he joined in an agreement to import marijuana. Obviously, there is no direct proof of his consent. Neither is there any proof of his performance of an act directly in furtherance of the scheme. What was proved, construed most favorably to the prosecution and thus most strongly against Alvarez, is his statement that he planned to perform an act subsequent to importation, unloading the plane. That this would have been a criminal act, if done, is indisputable, but it is insufficient beyond reasonable doubt to prove that he had joined in a conspiracy to import a prohibited substance.

To justify a conviction for conspiracy, there must be evidence that Alvarez agreed to join in the unlawful plan. The evidence presented to the jury in this case permits that conclusion only by a long chain of compounded inferences: that Alvarez knew illegal activity was afoot; that Alvarez intended to unload illegal cargo upon the plane's return; that Alvarez, therefore, knew of an agreement between others to import the illegal cargo; and that, consequently, Alvarez must have joined that illegal agreement. There is direct proof only of Alvarez's intentions. That he knew the activity was criminal is a reasonable inference. The other two conclusions are logical non-sequiturs.

What Alvarez intended to do is culpable. But without more his statements are not punishable as conspiracy. It requires no imagination to construct a reasonable hypothesis of Alvarez's innocence of the charge against him. *United States v. Edwards*, 5 Cir. 19743, 488 F.2d 1154, 1157. He may demonstrably have striven to aid an uncompleted crime; he was not proved to be a conspirator. *Cf. United States v. Nelson*, M.D.Pa.1978, 451 F.Supp. 117, 119 *aff'd* 3 Cir. 1979, 593 F.2d 543 (acquittal on conspiracy count does not mandate acquittal on aiding and abetting count).

There is one other route, seldom used, by which to implicate an accessory in a conspiracy: it is to charge that he aided and abetted the conspiracy. *See* Comment, *Complicity in a Conspiracy as an Approach to Conspiratorial Liability*, 16 U.C.L.A.L.Rev. 155 (1968). That charge is not made here and patently could not be, for Alvarez actually did nothing to further the conspiracy whatever he may have planned to do in the future.[6]

6. For a discussion of the question whether to be guilty of aiding and abetting a conspiracy one must assist the conspirators in reaching an agreement or whether it suffices to do some act to help them attain its goals, *see* W. LaFave & A. Scott, Criminal Law § 61 at 463.

When we consider all the evidence in the case, we find that, at most, the government proved that Alvarez was a menial who intended to lend his pickup truck and his strong back to a plot confected by the mind of others. The crime they planned was still-born and Alvarez's criminal disposition was never employed. Whatever his subjective transgressions, he was not shown to have been a conspirator or to have adopted or joined in the scheme contrived by others.[7]

For these reasons, the judgment of conviction is REVERSED.

7. Sensing perhaps the weakness of its evidence, the government raised for the first time in oral argument the claim that Alvarez had waived his right to review of the trial judge's denial of his motion for a judgment of acquittal by failing to renew the motion at the close of all the evidence. Aside from the fact that the issue was raised so belatedly that we would not usually consider it, the argument appears to be based on failure to read the record, for at page 148 of the transcript, trial counsel for Alvarez, addressing the court said, "Therefore, we would move for a judgment of acquittal at the end of all of the evidence." This was after Alvarez had put on his defense, after Alvarez's counsel said he thought the government intended to put on witnesses in rebuttal, and after the court said, "I'll let you make your motion out of turn and consider them (sic) as having been renewed at the end of the government's case." (Obviously referring to the close of the evidence.)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Manuel Juan ALVAREZ,
Defendant-Appellant.

No. 78-5783.

United States Court of Appeals,
Fifth Circuit

Sept. 17, 1980.

The United States District Court for the Southern District of Florida, William O. Mehrtens, J., found defendant guilty of conspiracy to import marijuana, and defendant appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, 610 F.2d 1250, affirmed. On hearing en banc, the Court of Appeals, Reavley, Circuit Judge, held that evidence as to defendant planning to be present at unloading of airplane subsequent to importation of marijuana together with other evidence as to his relationship with other members of conspiracy was suffficient to sustain conviction on charge of conspiracy to import marijuana.

Affirmed.

Vance, Circuit Judge, filed dissenting opinion in which Fay, Rubin, Kravitch, Henderson, Politz, Hatchett, Tate and Thomas A. Clark, Circuit Judges, joined.

1. Conspiracy – 40.1

Government was not required to prove that defendant had knowledge of all details of conspiracy or each of its members, provided that prosecution established his knowledge of the essential of the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1013, 21 U.S.C.A. § 963.

2. Conspiracy – 40

Defendant may not escape criminal responsibility on grounds that he did not join conspiracy until well after its inception or because he played only a minor role in total scheme. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1013, 21 U.S.C.A. § 963.

3. Conspiracy – 47(12)

Evidence as to defendant planning to be present at unloading of airplane subsequent to importation of marijuana together with other evidence as to his relationship with other members of conspiracy was sufficient to sustain conviction on charge of conspiracy to import

* Judge Jerre S. Williams has become a member of the Court since June 26, 1980, when this case was taken under submission. He does not wish to participate in the decision.

marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1013, 21 U.S.C.A. § 963.

Appeal from the United States District Court for the Southern District of Florida.

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJO-FLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE SAM D. JOHNSON, and THOMAS A. CLARK, Circuit Judges.*

REAVLEY, Circuit Judge:

Manuel Juan Alvarez was convicted of conspiring to import marijuana in violation of 21 U.S.C. § 963 (1976). A panel of this court reversed the conviction because it concluded that the government had failed to produce sufficient evidence that Alvarez had joined in the agreement to engage in illegal activity. *United States v. Alvarez*, 610 F.2d 1250 (5th Cir. 1980). Sitting en banc we now reach a different conclusion; the evidence was sufficient to convict.

Our only question is whether the jury could reasonably conclude that the evidence, viewed in the light most favorable to the government, left no reasonable doubt of the appellant's guilt. Viewed in that light, the evidence shows that John Cifarrelli and Edward Peterson during April and May of 1978 discussed with undercover DEA agents Martinez and Caton their scheme for importation of marijuana from a farm in Colombia to the Miami area. The transportation was to be by aircraft to be loaded at a farm in Colombia owned by a coconspirator, refueled at a small island in the Caribbean and offloaded at a rural site west of Miami. The undercover agents were to supply the aircraft for an agreed price. Maps, radio frequencies and code names were produced.

The owner of the Colombian farm, Genaro Cruz, arrived in Miami from Colombia on May 16. He spent the night with his friend, our appellant, Manuel Alvarez. The following morning Alvarez drove a pickup truck, in which Cruz was riding and which was loaded with household appliances, to the Opa Locka airport. There they met Cifarrelli, who directed them to the plane which had been supplied by the undercover agents. The agents had not previously met Cruz or Alvarez, nor had their names been revealed, although the agents had been told that the owner of the Colombian farm would handle things on that end and that ar-

rangements would be made for unloading the plane when it returned. Cifarrelli told Agent Martinez that the other two men in the pickup truck were the farmer from Colombia and the one who would be at the off-loading site on return. Martinez discussed the plan with Cruz, who confirmed that he owned the farm where the marijuana would be obtained and that security was assured. Martinez then asked Alvarez if he was going to be there at the unloading site. Alvarez smiled, nodded affirmatively, and asked Martinez if he was going on the plane. After Alvarez had loaded appliances on the plane and was about to leave in the truck, the identity of the agents was revealed and the conspirators were placed under arrest.

Two other aspects of the proof relative to the Florida return site have probative effect. On May 10 the agents were to be shown where this field was located. An associate of Cifarrelli named Nick left them to "talk with a guy who had the field" and get a key to the gate. After Nick failed to return when expected, the two agents and Cifarrelli attempted to locate him. Cifarrelli directed them to an apartment house where they eventually met Nick, who explained that he had encountered a problem at the apartment house and that the landing field they were to be shown was unacceptable. It later was learned that Alvarez lived at the apartment house where this had occurred. Then on may 15 the agents went to see the off-loading site which was to be used. It was in southwest Dade County and was not a likely place for an airplane to land. The flat land which was to be the landing area lay between a canal and cultivated land. After looking at it, the group agreed that two trees would have to be removed prior to the landing.

The conspiracy to accomplish the unlawful purpose is plain. Then, did Alvarez know of the unlawful purpose and of the agreement between the others to accomplish it, and did Alvarez join the agreement? Alvarez was a friend of Cruz, the Colombian who was to supply the marijuana. When Cruz came from Colombia on the evening before the arrest and, at a prior date, he stayed at the apartment of Alvarez. The appliances had been stored at that apartment complex and were loaded on a truck driven by Alvarez and taken to the airport where, again, he loaded them onto the airplane. When the conspirators went to see the one who knew about the site to which the plane would return, it was an apartment house where Alvarez also lived. Both Cifarrelli and Alvarez assured agent Martinez that Alvarez would be at the off-loading site.

[1, 2] The government was not required to prove that Alvarez had knowledge of all the details of the conspiracy of each of its members, provided that prosecution established his knowledge of the essential of the conspiracy. *United States v. Feola*, 420 U.S. 671, 692, 95 S.Ct. 1255, 1267, 43 L.Ed.2d 541 (1975); *Blumenthal v. United States*, 332 U.S. 539, 556-57, 68 S.Ct. 248, 256, 92 L.Ed. 154 (1947). Nor can a defendant escape criminal responsibility on the grounds that he did not join the conspiracy until well after its inception. *United States v. Leach*, 613 F.2d 1295, 1299 (5th Cir. 1980); *United States v. Bates*, 600 F.2d 505, 509 (5th Cir. 1979); or because he plays only a minor role in the total scheme. *United States v. Wilson*, 500 F.2d 715, 724 (5th Cir. 1974), *cert. denied*, 420 U.S. 977, 95 S.Ct. 1403, 43 L.Ed.2d 658 (1975).

We agree with the panel that the aggregate of the evidence is sufficient to infer that Alvarez knew that criminal activity was afoot. It must also have been obvious to him that there was conspiracy to import the contraband because prior planning and concerted action would be required to load the marijuana in Colombia, fly it into this country, and unload it upon its arrival. *See United States v. Bridgeman*, 523 F.2d 1099, 1111 & n.5 (D.C.Cir. 1975), *cert. denied*, 425 U.S. 961, 96 S.Ct. 1743, 48 L.Ed.2d 206 (1976). Alvarez' joinder in the illicit compact is inferable on two fronts. First, there is direct evidence that Alvarez intended to be at the offloading site. A jury may well conclude that his intended presence manifested a prior agreement to assist in the unloading. Alternatively, the nodded head may be viewed as assurance to Martinez, then thought to be one in confederacy with Cifarrelli and Cruz, that Alvarez would be at the unloading site to insure that the aircraft was unloaded rapidly. *See United States v. Hassell*, 547 F.2d 1048, 1053 (8th Cir.), *cert. denied*, 430 U.S. 919, 97 S.Ct. 1338, 51 L.Ed.2d 599 (1977). That such assurances to assuage jittery accomplices can constitute conduct in furtherance of the conspiracy, indicating joinder, was also recognized in *United States v. Rodriguez*, 585 F.2d 1234, 1245 (5th Cir. 1978). (Although the *Rodriguez* panel opinion was vacated when the case was reheard en banc, the full court adopted the panel's disposition with respect to Smigowski. *United States v. Rodriguez*, 612 F.2d 906, 908 n.1 (5th Cir. 1980).

[3] The evidence would have been insufficient to support the conviction without the proof that Cifarrelli and Alvarez assured agent Martinez that Alvarez would be on

hand at the place and time of the airplane's return to Florida. That proof, combined with all of the other evidence, clearly warranted the verdict of guilt. A reasonable jury could very well conclude that only one with knowledge of the marijuana, and who had agreed to participate in the scheme to accomplish its importation, would promise to be on hand at a remote and unlikely area for the unloading of cargo. Alvarez saw the appliances receive customs clearance; no customs office sat on the canal bank. Prior to Alvarez' confirmation that he could be depended upon for this purpose, Cifarrelli had told the agent that Alvarez would fulfill this role. Cifarrelli and the agent had surveyed the offloading site. The jury was entitled to conclude that Cifarrelli thereby assured the one who was supplying the aircraft that Alvarez had agreed to perform his duty in the plan for importation. That duty was such that anyone agreeing to perform it would, without any doubt, understand that the operation was illegal.

The evidence presented was sufficient to support the jury verdict. The judgment of conviction is AFFIRMED.

VANCE, Circuit Judge, with whom FAY, RUBIN, KRAVITCH, HENDERSON, POLITZ, HATCHETT, TATE and THOMAS A. CLARK, Circuit Judges, join, dissenting:

Alvarez nodded his head and smiled. For this he will go to the penitentiary.

In another case a smile and the nod of the head may be sufficient to establish guilt. Here it clearly was not.

This is not a case where an alleged conspirator was engaged in an illegal act or in the presence of a large quantity of contraband so that it reasonably may be inferred that he knew what was afoot. Neither is it a case where he was shown to have participated in or even been present during any conspiratorial conversation. Alvarez was engaged in a completely legal act. He was loading a washing machine onto an airplane. He was asked whether he was going to be there at the unloading site when the plane got back. It was in response to this innocuous inquiry that he smiled and nodded his head. This is all the admissible evidence to which we are cited to show that Alvarez knew of the unlawful conspiracy and agreed to join in it.

The majority points to Alvarez' association with other defendants under suspicious circumstances and recounts suggestive remarks by conspirators outside Alvarez' presence. But it is not

enough that he was associating with bad people. *Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir. 1980); *United States v. Wieschenberg*, 604 F.2d 326, 335 (5th Cir. 1979). Neither will merely suspicious circumstances substitute for proof of his guilt. *United States v. Dyar*, 574 F.2d 1385, 1389 (5th Cir.), *cert. denied*, 439 U.S. 982, 99 S.Ct. 570 (1978). The conversations of participants in the conspiracy to which the majority alludes were not even admissible as to Alvarez unless it be shown that he too was a conspirator. *United States v. James*, 590 F.2d 575, 581 (5th Cir.)(en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979).

We said that we have banished the slight evidence rule and that proof beyond a reasonable doubt that a defendant knew and intended to join a conspiracy must be based on substantial evidence. *United States v. Malatesta*, 590 F.2d 1379, 1382 (5th Cir.)(en banc), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). To be sufficient the evidence must be such that reasonable minds can conclude that it is inconsistent with every hypothesis of innocence. *United States v. Wieschenberg*, 604 F.2d at 330-31; *United States v. Warner*, 441 F.2d 821, 825 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971).

Alvarez may have been a guilty coconspirator or he may have been a humble workman perfoming a lawful act totally unrelated to any conspiracy, who simply indicated that he would report back to work as instructed. To my mind the majority opinion suggests no way that a jury reasonably could accept one hypothesis to the exclusion of the other.

The conspiracy statutes are vitally important to the protection of society. Yet the potential for injustice in conspiracy cases is enormous. The prosecutor's net may well ensnare the innocent as well as the guilty. The presentation of evidence in such cases is sometimes almost chaotic. We should use particular care to ensure that the prosecution actually proved that the defendant was a participant in the conspiracy before he is sent to prison. Our concept of justice rests on the basic notion that it is only for personal guilt that punishment is justified. *Scales v. United States*, 367 U.S. 203, 224-25, 81 S.Ct. 1469, 1483-1484, 6 L.Ed.2d 782 (1961). In this case the evidence simply falls short. I would reverse.

No. 80-1375

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ALEXANDER L. STEV
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In the Supreme Court of the United States

OCTOBER TERM, 1980

MANUEL JUAN ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1375

MANUEL JUAN ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the evidence was insufficient to support his conviction for conspiracy to import marijuana.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 963. He was sentenced to imprisonment for four years, to be followed by a two-year special parole term.[1] A panel of the court of appeals reversed, holding that the evidence was insufficient to support the conviction (Pet.

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[1]The petition for a writ of certiorari does not challenge the propriety of imposing a special parole term as part of petitoner's sentence for the drug conspiracy offense. In *Bifulco* v. *United States*, 447 U.S. 381 (1980), this Court held that a special parole term may not be imposed upon a defendant convicted of a drug conspiracy. Under Fed. R. Crim. P. 35, the district court retains power to correct this aspect of petitioner's sentence.

App. 1-13). Subsequently, the court of appeals *sua sponte* granted rehearing en banc and affirmed petitioner's conviction (Pet. App. 14-19).

The evidence at trial shows that in April and May 1978, co-conspirators John Cifarelli and Edward Peterson met with two undercover DEA agents, Charles Martinez and William Caton, to discuss a plan to transport a large quantity of marijuana from Colombia to Miami, Florida. At an initial meeting, the agents agreed to furnish the aircraft needed to transport the contraband. Subsequently, at a meeting on May 10, Cifarelli and another co-conspirator, known only as Nick, expressed a desire to show the agents a proposed landing area. Nick left the meeting, stating that he intended to contact the individual who had the field, and to get a key to the gate. Because Nick failed to return when expected, the two agents accompanied Cifarelli to an apartment house to look for Nick. Petitioner resided in one of the apartments at that address. When Cifarelli and the agents next saw Nick, he explained that the person he wanted to meet had stated that the proposed landing field was unacceptable. Five days later, the agents were shown an alternate landing site, located between a canal and cultivated land (Pet. App. 15-16).

The Colombian source, co-defendant Genaro Cruz, arrived in Miami on May 16, 1978, and spent the evening at petitioner's apartment. The next morning petitioner drove Cruz to the Opa-Locka airport. The truck driven by petitioner contained household appliances that Cruz intended to take with him to Colombia. Cifarelli and the DEA agents also arrived at the airport that morning. Cifarelli had told the agents that the Colombian source would meet them there. When petitioner's truck arrived at the location of the aircraft that the agents purportedly intended to fly to Colombia, Cifarelli introduced Cruz as the Colombian farmer who would furnish the marijuana, and identified

petitoner as the person who would be present at the off-loading site. Agent Martinez spoke with petitioner, asking whether he would be present at the off-landing site. Petitioner nodded his head affirmatively and smiled, and asked Martinez if he was going to be on the plane. Agent Martinez then talked with Cruz, who confirmed that he owned the farm where the marijuana would be obtained. After petitioner had loaded the appliances onto the airplane, the agents arrested petitoner and the other co-conspirators.

2. Petitioner claims that the evidence failed to establish that he was a knowing participant in the conspiracy alleged in the indictment. This contention, which involves the application of established principles of law to the facts of this case, was properly rejected by the en banc decision of the court below. Further review of this essentially factual issue is unwarranted.

It is well settled that a defendant's membership in an unlawful conspiracy is established by proof that he had a general knowledge of the overall purpose and scope of the conspiracy and voluntarily participated in it. See, *e.g., United States* v. *Bailey*, 607 F. 2d 237, 243 (9th Cir. 1979), cert. denied, 445 U.S. 934 (1980); *United States* v. *Conroy*, 589 F. 2d 1258, 1269-1270 (5th Cir.), cert. denied, 444 U.S. 831 (1979). The government need not prove that the defendant knew the identity or particular role of each of the other conspirators or knew the details of each of the conspirator's unlawful activities. See, *e.g., United States* v. *McCarty*, 611 F. 2d 220, 222 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980); *United States* v. *Michel*, 588 F. 2d 986, 995 (5th Cir.), cert. denied, 444 U.S. 825 (1979). As this Court explained in *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (footnote omitted):

> Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law

> rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all of its details or of the participation of others.

In this case, there is substantial evidence showing that petitioner was aware of and voluntarily participated in the conspiracy alleged in the indictment. When details of the original landing site were being discussed, a co-conspirator visited petitioner's apartment house to obtain critical information from one of the other conspirators. Thereafter, the Colombian drug dealer stayed at petitioner's house and was driven by petitioner to the final conspiracy meeting at the Opa-Locka airport, whereupon petitioner unloaded goods that were to be brought to Colombia as part of the conspiracy. Moreover, at that time, details of the conspiracy were openly discussed in petitioner's presence without fear of overhearing by hostile parties. And when a co-conspirator made reference to petitioner's role in the conspiracy, petitioner made no attempt to deny or explain this comment. Rather, he confirmed his involvement by indicating that he would be present at a location not customarily used for landing aircraft, at a time when the marijuana would be removed from an arriving airplane. Based on the totality of this evidence, the jury could reasonably have concluded beyond a reasonable doubt that petitioner knowingly and intentionally conspired to import marijuana into this country. See, *e.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 319 & n.12 (1979); *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954); *Giasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Muller*, 550 F. 2d 1375, 1380 (5th Cir.), cert. denied, 434 U.S. 971 (1977).[2]

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[2]There is thus no substance to petitioner's contention that the court of appeals impermissibly relaxed the standard of proof in this conspiracy

Petitioner further contends (Pet. 5-6) that the government relied on co-conspirator Cifarelli's inadmissible hearsay statements. But petitioner failed to object to that testimony[3] and may not now be heard to complain. See, *e.g.*, Fed. R. Evid. 103(a)(1); *United States* v. *Gresham*, 585 F. 2d 103, 106 (5th Cir. 1978); *United States* v. *Maultasch*, 596 F. 2d 19, 24 (2d Cir. 1979). In any event, Cifarelli's inculpatory statements regarding petitioner and made in his presence were admissible against petitioner as adoptive admissions. See Fed. R. Evid. 801(d)(2)(B); *United States* v. *Giese*, 597 F. 2d 1170, 1195-1197 (2d Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Williams*, 577 F. 2d 188, 193-194 (2d Cir.), cert. denied, 439 U.S. 868 (1978); *United States* v. *Weaver*, 565 F. 2d 129, 135 (8th Cir. 1977). Similarly, the substantial independent evidence connecting petitioner to the conspiracy rendered Cifarelli's statement admissible as co-conspirator's declarations. See Fed. R. Evid. 801(d)(2)(E); *United States* v. *James*, 590 F. 2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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case. The court simply analyzed the totality of the evidence and determined that the government's proof amply supported the jury's verdict. See *Jackson* v. *Virginia*, *supra*. Petitioner challenges this factual conclusion by erroneously evaluating each item of evidence separately instead of viewing the proof as a whole.

[3]Contrary to petitioner's claim (Pet. 2), petitioner made no objection at the time this evidence was admitted (see Tr. 82, 102-103). After the government had rested, defense counsel moved to strike all evidence against petitioner because of a lack of proper foundation (Tr. 108-109).